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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1918.

No. 568 172

GEORGE A. COLE, ED. MALLEY, GILBERT C. ROSS, J. J. HEALEY, GUY DAVIS, GEORGE B. THATCHER AND WILLIAM FORMAN, PETITIONERS,

vs.

JOSEPH RALPH, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

GEORGE B. THATCHER,
WILLIAM C. PRENTISS,
Attorneys for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petition of George A. Cole, Ed. Malley, Gilbert C. Ross, J. J. Healey, Guy Davis, George B. Thatcher, and William Forman respectfully shows:

The petitioners are the claimants of the Homestake placer mining claim, located September 26, 1913, which conflicts with the alleged Midas and Evening Star lode mining claims, located March 27, 1907. (See diagram, Record, p. 1279, and 249 Fed., 84.)

After injunction proceedings in which the petitioners

were restrained from working the Homestake placer, the respondent on August 1, 1914, filed application for patent for the said alleged lode claims, and adverse claim on behalf of the Homestake placer was duly filed and followed by adverse suit in the proper State court (Nevada), filed September 20, 1914, which was removed to the United States District Court for the District of Nevada.

The adverse suit was in the form of an action for possession and for decree declaring the petitioners to be the owners of the Homestake placer (R., p. 16, 249 Fed., 81-82).

In his answer the respondent denied the validity of the Homestake placer claim, set up the validity of the alleged Midas and Evening Star lode claims, and pleaded as to each alleged lode claim that from the time of location thereof until the 8th day of September, 1913 (date of location of the Homestake placer), he and his grantors were in the open, notorious, adverse and undisputed possession thereof, holding, working and living thereon (R., pp. 22-28).

This and the companion case between the same parties involving the adverse of the Guy Davis placer against the alleged Salt Lake No. 3 lode claim, involving the same issues, were consolidated for trial.

The petitioners, as plaintiffs, contended that the alleged lode claims were void for want of discovery, and introduced evidence tending to prove that no lode or vein had been discovered or was known to exist within the limits of any of the alleged lode claims up to the time the placer locations were made.

The respondent introduced the testimony of parties who made the locations of the alleged lode claims and other witnesses (including the respondent himself, a mining engineer) as to alleged discovery or existence of veins or lodes, and also testimony tending to show that possession of the alleged lode claims had been maintained from the time of location thereof and that considerable work in the way of excavations, shafts, tunnels, etc., had been done and improvements made in the way of buildings thereon, and

contended ultimately that the local statute of limitations of Nevada applying to mining claims had operated as a statute of repose to perfect title to the alleged lode claims and foreclose inquiry into the question of discovery supporting the same.

At the close of the testimony the petitioners, as plaintiffs, submitted prayers for instructions upon the question of what constituted discovery sufficient to support a lode location (R., pp. 1202-1208).

The respondent, as defendant, submitted (R., p. 1208 *et seq.*) various prayers upon the subject of title by adverse possession, two of which incorporated discovery as an essential element (R., p. 1213 at bottom, and p. 1218 at top of 1219, the latter appearing as No. 17, R., p. 96) and others of which ignored discovery as an essential element (No. 6, R., p. 87; No. 8, R., p. 89; No. 16, R., p. 95), and also prayers upon the subject of discovery.

The trial judge made the following announcement (R., p. 1202):

> "I don't think there is any adverse possession in the case, so the instructions based on adverse possession will not be given; I exclude them, not because they do not correctly state the law, but simply because I regard them as unnecessary. The instructions with reference to assessment work will be eliminated with this statement: The plaintiffs have tendered no issue as to the performance of the assessment work, therefore they cannot recover in this case solely on the ground that there was a failure to perform the assessment work,"

and at the close of the argument instructed the jury that it appeared, and was conceded by both parties, he thought, that not only the lode locations, but the placer locations, were properly staked, notices placed, and certificates which complied with the law duly recorded, and that there was no question as to the doing of assessment work by the lode claimants, and that practically the only question was whether valid discoveries had been made on the alleged

lode claims prior to the times when the conflicting placers were located (R., pp. 1225, 1232), that without discovery there is no location (R., p. 1225), as to what constitutes a lode or vein within the meaning of lode mining law (R., p. 1230), and that each party was in a sense an actor and the burden was on each to establish the validity of his own location (act of March 3, 1881, 21 Stat., 503), but that the burden was on the plaintiffs in the first instance to show that when they went on these claims to locate the placers the ground was open to location and that there were at that time no valid subsisting locations where their discoveries were made and their notices posted (R., p. 1236).

The jury returned general verdicts for the plaintiffs and (under local Nevada practice) three special verdicts finding that no valid discovery of a lode or vein had been made within the limits of any of the alleged lode claims prior to the time of conflicting placer location (R., pp. 32-34), and judgment was entered for the plaintiffs, petitioners here.

The cases went, on bills of exceptions, to the United States Circuit Court of Appeals for the Ninth Circuit, which, on March 8, 1918, by opinions and judgments (R., p. 1272 *et seq.;* 249 Fed., 81) reversed the judgments below and remanded the cases for a new trial.

On April 3, 1918, the petitioners filed in said court a petition for rehearing which on May 13, 1918, was denied (R., p. 1308).

The main opinion (per Ross, Circuit Judge), read in the light of the record, resolves into the ruling that notwithstanding the trial court instructed the jury that practically the only question was whether the lode locations were supported by discoveries made at any time up to the date of placer location, and gave the usual proper instructions on the subject of discovery, nevertheless "some" of the requested instructions on the subject of title by adverse holding under the Nevada statute (which the trial court held unnecessary) should have been given to the jury.

As the opinion recognized discovery as an essential ele-

ment, the instructions referred to generally as "some" necessarily are those, *supra,* in which discovery was included as an essential element.

The later suggestion that recitals in the notices of location of the fact of discovery created a presumption of discovery of mineral, was not decisive of any question presented by the record, inasmuch as the respondent did not ask any such instruction and no exception to the court's charge or otherwise presented that question.

The concurring opinion of Hunt, Circuit Judge (R., p. 1298; 249 Fed., 93), after quoting the prayer designated as No. 16, *supra,* as follows:

> "The court instructs the jury that if you find from the evidence that the defendant and his grantors had entered and held possession of the lode mining claims involved in these actions, and worked the same in the usual and customary way in the vicinity thereof for a period of two years prior to the making of the placer locations of the plaintiffs, then the law presumes in aid thereof that all the acts necessary to a valid location of said lode mining claims had been done and performed at the time of such lode mining locations, and that such possession (having the legal effect of a location under the law) is sufficient to give the defendant's grantors a lawful right to the possession of said mining claims, if kept alive as required by law, as against the subsequent placer locations of the plaintiffs' grantors,"

and the statement of the trial judge declining to give instructions based on adverse possession, *supra,* and likewise conceding that discovery is an essential element, concurred with the main opinion in holding that refusal to instruct upon the question of adverse possession was error, but, in undertaking to state grounds therefor, disclosed that the supposed error was not in respect of the prayers regarding adverse possession, but in instructing the jury regarding discovery and burden of proof on that issue.

The argument of the concurring opinion is that conceded

possession for years, posting and filing of proper location notices, and doing of annual assessment work and much additional expenditure, *testimony of witnesses to facts tending to show the existence of veins or lodes at the time of original location,* and conceded general mineral character of the country, "made a strong *prima facie* conclusion as against the placer claimants in favor of discovery by defendant."

It will be appreciated that testimony to facts tending to show the existence of veins or lodes at the time of original location would *per se* make a *prima facie* case of discovery. But the trial judge did not limit the issue to whether there was a valid discovery at the time of original location. He instructed the jury that discovery at any time before the placers were located would validate the alleged lode locations.

But, assuming that the concurring opinion holds that a presumption of discovery arises from location, long-continued possession and assessment and other work, no exception reserving that point can be found in the record. None of the defendant's prayers requested the court so to instruct the jury. All of the prayers on the subject of adverse possession which omitted discovery as an essential element, presented the proposition that two years' possession, claim and work prior to the placer locations, perfected title by force of the Nevada statute, that is, dispensed with proof of discovery. And the defendant's exceptions to the charge of the court as given (R., pp. 1237-1240) or to the admission of evidence reserved only the point that the Nevada statute operated as a statute of repose to lay at rest the question of discovery.

Moreover, the petitioners, as paintiffs, assumed the burden of proof, and presented their evidence tending to prove absence of discovery supporting the lode claims, thereby making a *prima facie* case against discovery, the respondent then presented all his available evidence on the subject, and the court instructed the jury that the burden was on the plaintiffs in the first instance to show that the alleged lode claims

were invalid; so that there was no room for any presumption on the subject of discovery.

The dissenting opinion of Gilbert, Circuit Judge (R., p. 1301; 249 Fed., 95), recognizing that, however faulty might be the grounds assigned therefor in the main and concurring opinions, the effective ruling of those opinions was that error was committed in refusing to give the instructions requested by the defendant on the subject of title by adverse possession by force of the Nevada statute, pointed out that the defendant had pleaded adverse possession, but not in the language of the Nevada statute, in that the allegation was "open, notorious, adverse and undisputed possession of said mining claim, holding, living and working upon said lode mining claim," whereas the Nevada statute provided that "occupation and adverse possession of a mining claim shall consist in holding and *working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof;*" that there was no evidence that the alleged lode claims had ever been worked "in the usual and customary mode of holding and working similar claims," or had ever been worked at all; that all the proof of work done on the alleged lode claims prior to the placer locations was proof to show that annual assessment work had been done, consisting of sinking shafts and excavating tunnels, in none of which, and nowhere on any of the claims, was an ore body developed or any ore ever taken, and in none of which was there any "working" of a claim; that the statute of Nevada can avail the holder of a mining claim by adverse possession only upon the theory that the claim has been shown to be a workable claim and that the act of working it involves discovery and stands for proof of discovery; and that the decision of the majority commits the court to the proposition that in Nevada mining land, or indeed any land, may be acquired as against all except the United States by filing a location notice, marking the ground and doing annual assessment work for two years, without making a discovery; that if such had been the intent of the Nevada act it

would be void as violative of the fundamental doctrine of the mining law, that one who locates and occupies and does annual assessment work on mineral land, cannot hold the same against another who peaceably, and not fraudulently or clandestinely, locates the ground and is the first to make discovery thereon, citing section 2320, U. S. R. S., and numerous cases, and quoting from Humphrey *vs.* Idaho Gold Mines Dev. Co. (21 Idaho, 126; 120 Pac., 823), where the true doctrine is stated.

The dissenting opinion also pointed out that Vogel *vs.* Warsing, 146 Fed., 948, 951, and other cases cited in the main opinion of Ross, Circuit Judge, have no application to the present case for that here there was no room for the indulgence of a presumption of discovery, because the question of discovery by the lode claimants was directly placed in issue and was the principal issue in the case, the defendant presented all his available testimony to show actual discovery, and the jury by special verdicts on that issue alone found that there was no discovery.

The petitioners submit that, however the two concurring opinions be construed, the reversal of the judgment of the trial court was manifest error in that the case was properly submitted to the jury, and the defendant's exceptions to the admission of evidence, to the refusal of the court to give instructions by him requested, and to the charge of the court as given, were not well taken; and that such reversal, which necessarily must be regarded as based upon the exceptions reserved, presents fundamental questions under the federal mining law of general public interest and concern, of which this court should take cognizance by writ of certiorari, viz:

1. Whether error was committed in refusing to give instructions on the subject of adverse possession which incorporated proof of discovery as an essential element, when the court instructed the jury that the only question was whether the alleged lode claims were supported by discovery;

2. Whether error was committed in refusing to give instructions on the subject of adverse possession which omitted

mention of discovery as an essential element; which resolves into

a. Whether the Nevada statute undertakes in terms or effect to dispense with proof of discovery as an essential element, and

b. Whether such statute so construed would be void as inconsistent with, and violative of, the fundamental principle of the federal mining law, that discovery is a precedent condition and essential element of a mining claim.

These questions involve the effect and operation of section 2320, U. S. R. S., which declares that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and section 2332, U. S. R. S., which provides:

> "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

The Nevada Statute in question (Act of Nov. 21, 1861, as amended in 1867; Cuttings Compiled Laws of Nevada, 1861-1900, Par. 3706, Sec. 4), provides:

> "No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before

> the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof. All provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims: Provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used; and provided, further, that when the terms 'legal title' or 'title' are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim."

It is settled that State statutes repugnant to the federal mining law are void (Belk *vs.* Meagher, 14 Otto, 279; 26 Law Ed., at p. 738; Butte City Water Co. *vs.* Baker, 196 U. S., 119, 126), and that section 2332, U. S. R. S., does not, and that a State statute cannot, dispense with discovery, is recognized by both the concurring opinions in the court below; but, in the absence of any exceptions presenting the other questions passed on in those opinions, the reversal of the judgment of the trial court operates to the contrary.

The further questions, not presented by any exceptions in the record but which are passed upon in the two concurring opinions and the rulings upon which therein the trial court would no doubt feel bound to respect in case the new trial ordered were to be had, also go to fundamental principles of the federal mining law of general public interest and concern, viz:

1. Whether recital in a location notice or certificate creates a presumption of discovery of mineral.

On this point there is a conflict of ruling between the opinion of Ross, Circuit Judge, and decisions of the Supreme Court of Nevada (Round Mountain Mining Co. *vs.*

Round Mountain Sphinx Mining Co., 36 Nev., 546, 560, and Fox *vs.* Myers, 29 Nev., 169, 186), and the highest courts of other states in cases cited in the accompanying brief, and the Circuit Court of Appeals for the Ninth Circuit (same court, per Gilbert, Circuit Judge) in Thomas *vs.* South Butte Mining Co., 211 Fed., 105.

2. Whether long-continued possession, claim, and work or improvement, create a presumption of discovery (concurring opinion of Hunt, Circuit Judge), and, in particular, whether there is any room for such presumption where, as here, the attacking party has the opening and makes a *prima facie* case against discovery, and the defendant produces the parties who made the locations to testify to alleged discoveries, and all other available evidence as to alleged discovery up to the time the placers were located. On this point there is a conflict of ruling between the opinion of Hunt, Circuit Judge, and the ruling of the same court in Thomas *vs.* South Butte Mining Co., *supra.*

3. Whether, on the contrary, long-continued possession of an alleged lode mining claim without development of any mine therein, raises a presumption against the discovery or existence of a vein or lode therein, as held by the land department (Purtle *vs.* Steffee, 31 L. D., 400; Brophy *vs.* O'Hare, 34 L. D., 596).

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Joseph Ralph, plaintiff in error, *vs.* George A. Cole, Ed. Malley, Gilbert C. Ross, J. J. Healey, Guy Davis,

George B. Thatcher, and William Forman, defendants in error, No. 2953, to the end that said case may be reviewed and determined by this court, as provided by section 240, Judicial Code, and that your petitioners may have such other and further relief or remedy in the premises as the court may deem appropriate and in conformity with said provisions of the Judicial Code, and that said Judgment of said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

GEORGE B. THATCHER,
WILLIAM C. PRENTISS,
Attorneys for Petitioners.

BRIEF.

The foregoing petition and a similar petition in the companion case between the same parties involving the conflict between the Guy Davis placer, and the alleged Salt Lake No. 3 lode claim are presented, and as the questions in the two cases are identical, this brief is submitted in support of both petitions.

As disclosed in the petitions, the petitioners contended in the courts below that the only question controlling the two cases was whether or not the alleged lode locations were supported by discovery, while the respondent contended that the Nevada statute of limitations applying to mining claims, had, at the time the placers were located, operated as a statute of repose to lay at rest the question of discovery supporting the alleged lode claims. The trial court held, in effect, that the State statute could not dispense with proof of discovery and, as it appeared and was conceded that the alleged lode locations were properly staked, proper notices posted, and proper certificates duly recorded, there was no occasion for invoking the statute of limitations, and submitted the case to the jury on the question of discovery as controlling the case. The jury returned a general verdict for the plaintiffs (petitioners here) and special verdicts finding that no discovery had been made within the respective alleged lode claims up to the time of the placer locations.

On appeal by the defendant (respondent here), the majority of the Circuit Court of Appeals held that "some" of the instructions asked by the defendant on the subject of title by possession under the Nevada statute should have been given, but both opinions recognized that the State statute could not dispense with discovery, and, as grounds of reversal because of the refusal of such prayers, apparently held that the jury should have been instructed that recitals in the location notices created a presumption of discovery (Ross, C. J.), or that the jury should have been instructed that long-

continued possession and claim, and doing so-called assessment and other work, created a presumption of discovery (Hunt, C. J., concurring), questions which were not presented by any exceptions.

In the final analysis, the ground of the reversal below, which must be regarded as based on exceptions found in the record, was the refusal of the trial court to give the instructions (or some of them) on the subject of title by possession under the Nevada statute. The primary question, therefore, is

The Status, Effect and Operation of the Nevada Statute of Limitations.

The statute in question (quoted in the foregoing petition), act of November 21, 1861, as amended in 1867, appearing in Cutting's Compiled Laws of Nevada, 1861-1900, as paragraph 3706, section 4, was originally passed before any Federal mining legislation, and obviously was directed to conditions which had arisen under local rules and regulations of the miners.

Whether or not that statute, when originally enacted, in intent or operation, applied to claims upon which no discovery had been made, is now immaterial inasmuch as the subsequently enacted Federal mining law, sec. 2320, U. S. R. S., declared that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and the State statute, if repugnant thereto, was thereby repealed to the extent of the repugnancy. Belk *vs.* Meagher, 14 Otto, 279; 26 Law Ed., at p. 738.

And, generally, State statutes repugnant to the Federal mining law are void. Butte City Water Co. *vs.* Baker, 196 U. S., 119, 126.

That the State statute in question cannot dispense with discovery is recognized in both of the concurring opinions in

the court below, although, as before noticed, the reversal of the judgment of the trial court must be regarded as operating to the contrary.

The Effect and Operation of Sec. 2332, R. S. U. S.

This section (quoted in the foregoing petition) provides that where the claimant has held and worked his claim for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claim for such period shall be sufficient to establish a right to a patent thereto "under this chapter," in the absence of any adverse claim.

In Reavis *vs.* Fianza, 215 U. S., 16, which was a controversy over known gold mines in the Philippines, this court held that under section 45, chapter 1369, of the Philippine act of July 1, 1902, 32 Stat., 691 (corresponding to U. S. R. S., 2332), the right to a patent to a mining claim was equivalent to a right to the thing itself, that is to say, a right of the kind that equity specifically enforces. There was in that case no question of discovery. The subject of controversy was known mines which Fianza and his ancestors had actually worked.

In Belk *vs.* Meagher, *supra,* where also there was no question of discovery, this court, construing U. S. R. S. 2332, said:

> "Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough and kept all others out, his right to a patent would be complete. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and if he was not actually in, he was, in law, out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby

> acquired, operated as an ouster, which broke the continuity of his holding and deprived him of the title he might have got if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being, in law, vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force."

And the purpose of U. S. R. S. 2332, is well stated in McCowan *vs.* McLay, 16 Mont., 234; 40 Pac., 602 (cited with approval in Reavis *vs.* Fianza, *supra*), where, likewise, there was no question of discovery:

> "We are of opinion that this section was enacted to meet cases where applicants for a patent have been in possession of their claims for a period of the statute of limitations, but were unable to make full proof of their rights to a patent, as required by the previous provisions of the law; and to excuse their defects in title Congress determined that the land office should pass over such defects, and give them their patents, provided no one appeared to contest their applications. It would appear that the section was enacted to prevent an applicant from failing to obtain his patent simply for defects in his claim, when he had held a long undisputed possession, and no one had opposed him. The land office, under such circumstances, was thus authorized to omit some of the strict proof required from an applicant in consideration of there being no opposition to the application. But if an adverse claimant did appear, the contest should be referred to a court of competent jurisdiction for determination as in other cases."

See also Humphreys *vs.* Idaho G. M. D. Co., 21 Idaho, 126; 120 Pac., 823, 826, 827 (cited in the dissenting opinion of Gilbert, C. J.), where it was said:

> "It seems to us that the provisions of section 2332 of the Revised Statutes of the United States are intended to obviate the necessity for proof of posting and recording a notice of location in cases where the

> claimant to mineral ground has been in the actual, open, and exclusive possession of the ground for a period equal to that required by the local statute of limitations governing adverse possession of real estate. The adverse possession referred to in the statute is intended to supply the place of an abstract of title and such proofs as are furnished by the county recorder.
>
> *"It still remains, however, for the person who asserts claim by adverse possession to have made a mineral discovery,"* etc.

Also Upton *vs.* Santa Rita M. Co., 14 N. M., 96; 89 Pac., 275, 282, *et seq.*, where the subject is exhaustively treated.

We now ask this court to take cognizance of and decide the question whether or not U. S. R. S. 2332 does, or a State statute of limitations can, dispense with proof of discovery in an adverse suit or, rather, and more accurately speaking, we ask this court to interpose to prevent the miscarriage of justice resulting from the action of the majority of the court below in reversing the judgment of the trial court, because of the refusal of the trial judge to give instructions on the subject of title by adverse possession (particularly the instruction quoted in the concurring opinion of Hunt, C. J.), which ignored discovery as an essential element, while at the same time conceding the fundamental principle that there cannot be a mining claim without discovery and that until discovery the ground is open to valid location by anyone who first makes discovery thereon, or in the language of the main opinion of Ross, C. J.:

> "That discovery of a vein or lode within its boundaries is essential to the validity of any lode claim is beyond question, and the law is well settled that at any time previous to such discovery ground within the boundaries of such a claim, although within the actual possession of the claimant, is open to the entry of others by any legal means for the purpose of locating it under the mining laws. See the numerous cases cited in the recent case of Consolidated Mut. Oil Co. *vs.* United States, 245 Fed., 521."

briefly the testimony to which Gilbert, C. J., referred in his dissenting opinion.

John J. Healey, a witness on behalf of the plaintiff, testified (R., pp. 294-295), that he did not find anything in the nature of a lode or vein that would justify exploration or work and that there had never been any mining work done.

W. T. Moran, a witness for the plaintiff, testified (R., p. 358-359), that, eliminating the work done by placer claimants, there was no work in the nature of shafts, cuts, or crosscuts, which, in his judgment, constituted lode mining or which would tend to develop a lode mine.

John Jorey, a witness for the *defendant*, and who was one of the persons who located the Salt Lake No. 3 for J. H Clive, and who had been on the ground practically continuously from 1885, testified (R., pp. 588, 589, 590), that other than the road up to the mill and the grading for the mill there had not been, to his knowledge, up to September 6, 1913 (date of placer locations), any mining operations carried on on that ground; that during that period the Salt Lake No. 3 had never, to his knowledge, been worked as a mine; that there had never been, to his knowledge, any sinking of shafts, cuts, or excavations, for the purpose of getting underground and developing an ore body.

Joseph Jurey, a witness for the *defendant*, who was also one of the parties who located the Salt Lake No. 3 for J. H. Clive, and who resided on a ranch near by and was frequently on the ground, testified (R., pp. 617-618) that outside of the excavation for the mill and grading the road, and sinking of a shaft in the southeast corner of the claim (which was in wash and had not extended to the bed rock), there had been no mining done on the Salt Lake No. 3.

Joseph Jurey, a witness for the *defendant*, who had been in his employ for many years, testified (R., pp. 663-668), that the annual labor on the Salt Lake No. 3 from 1898 to 1911, consisted in repairing the pipe line, and repairing the houses (R., pp. 670-673); that the annual labor on

the Evening Star and Midas for the years 1908-1911 was performed on the Eagle Tunnel, the portal of which is 600 feet east (and which does not extend in the direction of the claims in question), and that the annual labor on the Salt Lake No. 3 for 1912 was the mill and the grading for the road.

The mill was dismantled in 1913 before the placers were located (Joseph Ralph, R., p. 1056).

Jurey also testified (R., pp. 689-682) that he had lived on the Salt Lake No. 3 every year but one since 1898, and that from 1898 up to the present time he could not say that there had been any mining work done on that claim; that from 1898 to the end of 1913 the Salt Lake No. 3 was never worked as a mine.

This is the undisputed evidence in the case. There was no evidence of any other work on the alleged lode claims except the building of houses.

Therefore, aside from the instructions in question being unnecessary, as before suggested, it is apparent that, as pointed out in the dissenting opinion, the defendant did not plead or prove "working" of the alleged claims within the letter or intent of either the Federal or State statute, and the instructions in question were for that further reason properly refused.

This disposes of the questions presented by the exceptions appearing in the record. There remain to be considered the questions not presented by any exceptions in the record, but which were passed upon by the majority of the court below and the rulings upon which were apparently advanced as support for the reversal of the judgment of the trial court. As those questions are dependent somewhat upon the provisions of the Federal mining law regarding adverse suit, it is proper first to consider

The Nature and Status of Adverse Suit.

It is difficult to comprehend the purpose of, or the conclusion reached, if any, in the extended discussion of this subject in the main opinion of Hunt, C. J.

Suffice it to say that any doubt regarding the original intent of Congress was removed by the passage of the act of March 3d, 1881, 21 Stat., 505, which provided:

> "That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title."

As said by this court in Perego *vs.* Dodge, 163 U. S., 160, 167, 168:

> "We do not think the intention of this act was to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the land department, and the object of the amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either, and while the finding by a jury is referred to, we think that, where the adverse claimant chooses to proceed by bill to quiet title, and as between him and the applicant for the patent neither is found entitled to relief,

the court can render a decree to that effect, just as it would render judgment on a verdict if the action were at law."

Necessarily, therefore, it is incumbent upon each of the respective parties to establish the right of possession in himself under the Federal mining law and his proof must measure up to the degree which would avail him if the United States were an actual adversary party. He must establish the existence of a valid mining claim and there cannot be a valid mining claim without discovery. "Discovery is the foundation of the right, without which all other things are idle and superfluous." Round Mountain Mining Co. *vs.* Round Mountain Sphinx Mining Co., 36 Nev., 543, 560.

In the face of the Federal statute it is not competent for parties to an adverse suit *by stipulation* to dispense with proof of discovery. Garibaldi *vs.* Grillo, 120 Pac., 425-426. Nor can proof of discovery be dispensed with by self-serving recitals in location notices or by mere possession and claim for any period, or, what amounts to the same thing,

Neither Recitals in Location Notices nor Mere Possession and Claim for any Period Can Create a Presumption of Discovery.

1*st. With respect to recital in a location notice.*

To hold (main opinion of Ross, C. J.) that a self-serving recital in a location notice creates a presumption of discovery of mineral, is to hold that, in case the plaintiff in an adverse suit fail, the defendant may introduce his location notice reciting discovery and, upon the presumption thereby created, secure a directed verdict or judgment.

That such a judgment would not be binding on the land department is obvious. Clipper Mining Co. *vs.* Eli Mining Co., 194 U. S., 220, and 33 L. D., 660, 34 L. D., 401.

But aside from this, and aside from the self-evident proposition that a right against the United States cannot be cre-

ated by such a self-serving recital in a location notice, either directly or indirectly through the operation of a presumption, the ruling in the opinion of Ross, C. J., is opposed to the rulings of the Supreme Court of Nevada and to the settled doctrine in all of the other mining States.

In Fox *vs.* Myers, 29 Nev., 169, 186 (86 Pac., 793), the Supreme Court of Nevada said:

> "It will be seen that our statute has gone farther and makes it the duty of the locator, after he has made a discovery, to put his location notice at such point of discovery. *Proof of posting a location notice at a certain point, containing a recital therein that a discovery had there been made,* as in the case of the Ramsey Extension notice, *would not be evidence prima facie of a discovery,* as contended for by counsel for appellant, for the reason, if for none other, that the statute does not require the making of such a declaration in the notice."

And in Round Mountain Mining Company *vs.* Round Mountain Sphinx M. Co., *supra,* the same court said:

> "It is well settled that the basis of location is discovery and that the mere posting of a notice without a discovery is of no force or effect so far as rendering invalid another location covering a portion of the same ground based upon a valid discovery."

The rule succinctly stated by Lindley (on Mines, vol. 2, 3d ed., sec. 392):

> "Where such record is authorized, it is *prima facie* evidence only of such facts as are required by law to be stated therein, provided they are sufficiently stated. A record of a certificate of a location which recites the citizenship of locators, the fact of discovery, and the fact that the location had been marked upon the ground so that the boundaries could be readily traced, is not evidence of any of these facts in any of the states, for the simple reason that no such facts are required to be stated in any of the statutory notices.

"Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location, certificate, must, when contested, be established by proof outside of such certificate. The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, the last step in perfecting the location.

"While many of the states require the date of the discovery to be stated in the recorded certificate, this would not be evidence of the *fact* of discovery. A discovery once proved, such a record would, *prima facie*, fix the date. Discovery is the most important of all the acts required in the proceedings culminating in a perfected location. But it is not a matter of record, but *in pais*, and if controverted must be proved independently of the recital in the certificate. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three states (Idaho, Montana and Oregon), the certificate is executed with no solemnity. It is neither acknowledged nor sworn to. It is a mere *ex parte*, self-serving declaration on his own behalf of the party most interested. The same may be said of marking the boundaries."

To the cases cited by Lindley may be added Childers *vs.* Laham (New Mex.), 142 Pac., 924.

Upon examination none of the cases cited in the main opinion of Ross, C. J., herein, will be found to involve the particular question now under consideration. They will be commented upon under the next following head hereof.

In Thomas *vs.* South Butte Mining Co., 211 Fed., 106, Gilbert, C. J., speaking for himself and Ross and Morrow, Circuit Judges, distinguished Vogel *vs.* Warsing and Cheesman *vs.* Hart, saying:

"The mere fact that mineral lode locations were made is not proof that the ground on which they were located contained a vein or lode within the

meaning of section 2333 of the Revised Statutes (U. S. Comp., 1901, p. 1433). A mere location of an alleged vein or lode is not sufficient to prove that a vein or lode was known to exist. Migeon *vs.* Montana Central Ry., 77 Fed., 249; 23 C. C. A., 156. * * *

"Where mining claims which have passed out of the hands of the original owners have stood unchallenged for years, *and have been developed to a considerable extent,* the certificate of location, if in due form, may be deemed presumptive evidence of discovery and of a valid location. Vogel *vs.* Warsing, 146 Fed., 949; 77 C. C. A., 199; Cheesman *vs.* Hart (C. C.), 42 Fed., 98. But in the absence of such grounds for indulging in presumption in favor of the integrity of the location, it is held that the location notice is, when recorded, *prima facie* evidence only of what the statute requires it to contain, and which is therein sufficiently set forth. Strepey *vs.* Stark, 7 Colo., 614; 5 Pac., 111; Flick *vs.* Gold Hill & L. Min. Co., 8 Mont., 298; 20 Pac., 807; Bismarck Gold M. Co. *vs.* North Sunbeam Gold Co., 14 Idaho, 516; 95 Pac., 14. Revised Statutes 2324 (U. S. Comp. St. 1901, p. 1435) require that the certificate of location, and such a description of the claim by reference to some natural object or permanent monument as will identify it. The certificates of prior lode locations submitted in evidence by the appellant complied with the statute under which they were made. But they are not proof of discovery or of the existence of a vein or lode which would justify exploitation, *and especially should this be held where there is no evidence that the claims were ever developed,* and that they were not abandoned."

And in the present case Gilbert, C. J. (dissenting), said:

"Our decision in Vogel *vs.* Warsing, 146 Fed., 948, 951; 77 C. C. A., 199, sustaining a *prima facie* presumption of discovery, and other similar cases cited in the opinion of the majority of this court herein, have no application to the present case. There is no place here for the indulgence of a presumption of discovery. The question of discovery

by the lode claimant was directly placed in issue. It was a question of fact. It was the principal issue in the case. The defendant presented all his available testimony to show actual discovery. The jury by special verdicts on that issue alone found that there was no discovery."

2nd. As to long-continued possession and claim.

Likewise, to hold (concurring opinion of Hunt, C. J.) that mere long-continued possession and claim and doing of work (not mining) create a presumption of discovery of mineral, is to hold that in case a plaintiff in an adverse suit fail, the defendant may prove such mere long-continued possession and claim and doing work and, upon the presumption of discovery thereby created, secure a directed verdict or judgment.

That such judgment would not be binding on the land department is likewise obvious. Clipper Min. Co. *vs.* Eli Mining Co., *supra*.

Upon the facts of the present case (set forth in the dissenting opinion and more fully hereinbefore) the land department would hold that failure to develop a mine after such ample opportunity to do so was evidence that the alleged mining claims were invalid for want of discovery. Brophy *vs.* O'Hare, 34 L. D., 593; Purtle *vs.* Steffee, 31 L. D., 400.

Bearing in mind that we are here concerned with an adverse suit wherein it was incumbent upon the defendant to prove his right of possession under the Federal mining law, that is, that his alleged claims were valid locations supported by discovery, and where it appears that the parties who made the original locations were available and were produced as witnesses to testify to alleged discoveries at the time of location, that the issue was not confined to discovery at the time of location but the defendant was given opportunity to establish the validity of his claims by proof of discovery at any time before the location of the placers, and that there was

no evidence of any development of a mine or actual mining work, Vogel *vs.* Warsing and the other cases cited in the main opinion of Ross, C. J., lose pertinency.

Could those cases be regarded as authority even for a limited application of the principle in support of which they were cited, the controlling distinction would lie in the fact that here the majority of the court below would establish *by means of presumption alone* the fact of the existence of a vein or lode supporting the lode claims, whereas in Vogel *vs.* Warsing and the other cases the existence of a vein or lode or actual mine or mineral deposit was established by proof and the question was narrowed to whether or not the original locators had discovered it at the time of location.

It will be appreciated that so long as the existence of a vein or lode is established, the Federal statute is satisfied, and the jury were so instructed here. In such a case the issue may narrow to the question as to which of the adversary claimants was the first discoverer or which first complied with the law in other respects. If the original locator or other witnesses cannot be produced to testify to facts regarding discovery at the time of location, the proof of the existence of a vein or lode, mine, or deposit, may be of such character as in itself to sufficiently establish the fact of discovery thereof by the original locator. From the degree of conclusive proof the probative force of the facts may shade down to disappearance. It was with such situations that the courts in the cases cited in the main opinion of Ross, C. J., were attempting to deal.

In Vogel *vs.* Warsing the matter before the court was an appeal from an order denying an application, made at the beginning of ejectment proceedings, for injunction *pendente lite*. In support of the application for injunction it was contended that the original location of the Panorama claim must be regarded as void because it did not appear by affidavit that a discovery of gold was made at the time of location. Gilbert, C. J., delivering the opinion of the Circuit

Court of Appeals in that case, disposed of that contention, as follows:

> "The appellees, who claim to own the Panorama claim, are Clum, Cochran, and Briggs. They claim to be owners as purchasers, and not as locators. As the original locator and his witness were absent from Alaska, their affidavits could not be obtained. The validity of the location had been unchallenged for more than five years and up to the time of the commencement of the present action. It has been held that under such circumstances the certificate of location creates a presumption of discovery of mineral and of a valid location. Harris *vs.* Equator Mining & Smelting Co. (C. C.), 8 Fed., 863; 5 McCrary, 14; Cheesman *vs.* Shreve (C. C.), 42 Fed., 98. Especially should such a presumption be indulged in a summary proceeding instituted at the beginning of a suit where the granting or withholding of an injunction depends upon facts presented by affidavits and rests largely in the discretion of the trial court, and where a subsequent locator attacks the title of the prior locator or that of his successor in interest. In view of these considerations, we are not authorized to say that the court erred in denying the injunction sought for, on the ground that the location notice failed to mention the discovery of gold on the claim, and this conclusion is aided by the affidavit of Warsing, who had a lay on the claim and deposed that pay had been discovered by him and his colessees, and that "gravel on said claim is exposed on the surface on many parts thereof and carries fine gold throughout, so that panning from the surface is easily done and colors are easily found."

It will be observed that that case was not one of recital of discovery in the certificate of location but of absence therefrom of such recital. The decision went to the point that on such an application for preliminary injunction, addressed in large measure to the discretion of the court, and under the particular circumstances of the case as set forth in the opinion, it could not be assumed that the original locator had made the location without discovery.

Gilbert, C. J., who wrote the opinion in that case, dis-

posed of it in his dissenting opinion in the present case, as already noticed, by saying that it had no application here for that there was here no place for the indulgence of a presumption of discovery.

In Harris *vs.* Equator M. & S. Co., 8 Fed., 863, there was evidence to show that the lode in question was discovered (apparently by the original claimant) in 1867 and the plaintiffs attempted to show a valid location according to the law in force in that year, but failed and were forced to rely on possession in themselves and their grantors (p. 864). Hallett, District Judge, on motion for new trial said (p. 865) that, conceding that the title to and the right to occupy the public mineral lands can be acquired only in the manner prescribed by law, it does not follow that a locator in actual occupancy, who has been evicted by a wrongdoer, must give evidence of every fact necessary to a valid location in an action to recover possession—not on the ground that the essentials of a valid location are in any cases to be omitted, but that in support of undisturbed possession long enjoyed, a presumption may in some cases arise that the location was at first well made, referring, of course, to matters of posting, marking, recording, etc.

Cheesman *vs.* Shreve, 40 Fed., 787, may be disposed of by Lindley's note (on Mines, vol. 2, 3d ed., sec. 392, note 16):

> "Judge Phillips, in his charge to the jury in Cheesman *vs.* Shreve, 40 Fed., 787, 791; 17 Morr. Min. Rep., 260, said that certificates of location are presumptive evidence of discovery. But in this case, many years elapsed between the original location and the litigation, *and the fact of discovery was supported by the testimony of the parties.* Under these circumstances the judge held that every reasonable presumption should be indulged in favor of the integrity of the location. The reasoning, while persuasive, so far as this case is concerned, does not militate against the views announced in the text."

In Cheesman *vs.* Hart, 42 Fed., 98, the particular issue was whether or not the original locator had made discovery

at the time of location. All of the subsequent workings went to show the existence of a lode or vein on the claim of more or less importance. The original locator could not be produced. Phillips, J., in denying motion for new trial, after referring to the evidence, said (p. 102):

> "Possibly the charge in this particular would have been more theoretically correct had the court told the jury that it was not necessary that defendants should establish such discovery by witnesses to the physical fact at the time. But the same might be inferred from the certificate of location, the manifestations of workings done, the long tenure of the claim, *the development of a vein on the claim by subsequent working*, and from all the surrounding circumstances."

Judge Phillips thus recognized that it was not a question of presumption in the legal sense, but of permissible inference from established facts.

Here, there was no ground for even inference of the fact of discovery from the established facts. The original locators were present and testified to alleged discoveries made by them at the time of location. The jury either rejected their testimony or found that what they testified to did not amount to the discovery of a vein or lode under the instructions of the court on that subject. And the undisputed evidence was that no vein or lode had been developed or worked—no mining work had been done. As said by Gilbert, C. J., in his dissenting opinion, there was no room for any presumption on the subject of discovery. And, as we have reiterated, no instruction was asked on that subject and no exception presenting that question appears in the record. The defendant apparently was satisfied with the court's instruction to the jury that the burden was on the plaintiffs in the first instance to show that when they went on the ground to locate the placers it was not embraced in a valid subsisting location.

Respectfully submitted,

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